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No. 88-1302

In The

Supreme Court of the United States

October Term, 1988

PATRICIA BOHATCH, *et al.*,

Petitioners,

vs.

CHARLOTTE V. DELHAES, M.D., *et al.*,

Respondents.

On Petition For a Writ of Certiorari to the Court of Appeals, Eleventh Appellate District Lake County, Ohio

OPPOSING BRIEF OF RESPONDENTS CHARLOTTE V. DELHAES, M.D. and THE LAKE COUNTY MENTAL HEALTH CENTER

GARY H. GOLDWASSER,
Counsel of Record
THOMAS R. KELLY
REMINGER & REMINGER Co., L.P.A.

113 St. Clair Avenue, N.E.
Cleveland, Ohio 44114-1273
(216) 687-1311

Counsel for Respondents Charlotte V. Delhaes, M.D. and The Lake County Mental Health Center

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court should review Petitioners constitutional challenge to an Ohio law when the challenge was neither raised in the Ohio trial or Appellate courts, nor considered by those courts?

II. Whether the determination of causation in an informed consent action through the use of an objective standard violates Petitioner's right to privacy, due process or equal protection?

LIST OF PARTIES AND RULE 28.1 STATEMENT

Respondent the Lake County Mental Center ("Mental Center") is a 501(C)(3) not-for-profit corporation located in Mentor, Ohio. Respondent Charlotte V. Delhaes, M.D. ("Doctor Delhaes") is a physician who treated Petitioner Patricia Bohatch at the medical center. Prior to her treatment at the medical center, Petitioner Patricia Bohatch was treated by Respondent A. Dixon Weatherhead at the facilities of Respondent Cleveland Clinic Foundation. Rule 28.1 does not otherwise apply.

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STATEMENT OF THE CASE

Petitioner Patricia Bohatch was admitted for psychiatric treatment as an in-patient into the care of Respondents The Cleveland Clinic Foundation and A. Dixon Weatherhead, M.D. on May 27, 1983. Upon admission, Petitioner was psychotic, delusional, hallucinatory and suicidal. Dr. Weatherhead commenced short-term administration of a very low dose of the drug Haldol. Haldol is a neuroleptic drug prescribed to relieve the symptoms of

certain psychoses, including the paranoia and delusional thinking suffered by Petitioner at that time. It was the drug of choice and no drug alternative existed that did not have substantially similar risks.

Dr. Weatherhead considered the Petitioner, at the time of the administration of the drug, severely psychotic and without the capacity to understand any questions regarding the effects of the medication, and therefore he did not discuss the possible side effects of Haldol with Petitioner prior to commencing the administration of the drug. Dr. Weatherhead was also of the professional opinion that Mr. Bohatch might have been part of Mrs. Bohatch's psychiatric problem. Therefore, he did not believe it would be in Mrs. Bohatch's best interest to discuss the therapy or anything of a confidential nature with Mr. Bohatch.

During Petitioner's admission, the Haldol treatment was suspended for a short time. During that short time, Petitioner relapsed into severe paranoia. Administration of the drug was immediately resumed with beneficial results. When Petitioner was discharged, she was informed by Dr. Weatherhead that if she failed to continue taking Haldol, she would likely suffer a relapse of the symptoms she previously suffered from, including psychosis, morbid depression, intense guilt and paranoid delusions. Dr. Weatherhead further advised her to seek medical attention if any side effects or inexplicable symptoms developed.

Petitioner was discharged from the care of the Cleveland Clinic and Dr. Weatherhead on June 28, 1983 into the care of a more local facility on an out-patient basis, under the care of Respondents the Lake County Mental Health Center and Dr. Delhaes. Dr. Delhaes continued the Haldol

treatment, with the exception of reducing Petitioner's daily dosage of Haldol on July 27, 1983, from 3 times per day to 2 times per day, and again on December 22, 1983 from 2 times per day to once per day. Dr. Delhaes did not discuss tardive dyskinesia (a movement disorder) as a possible side effect of Haldol, because, in her professional opinion, development of the disorder was a rare occurrence in connection with Haldol use, and there were no reasonable alternative treatments available. In January of 1984, Petitioner had developed tardive dyskinesia.

Petitioner then brought suit against Respondents in the Court of Common Pleas of Lake County, Ohio. At trial, Respondents produced expert testimony that Haldol was properly prescribed and administered, and was critical for controlling Petitioner's symptoms. The jury found for Respondents.

Petitioners duly filed an Appeal of that judgment in the Eleventh District Ohio Court of Appeals. Petitioners did not raise any constitutional issues or other federal questions. Petitioners argued only that an improper jury instruction had been given on informed consent; that the trial court had erred in denying Motions for a Directed Verdict and for Judgment Notwithstanding the Verdict; and that the jury verdict was against the manifest weight to the evidence. The Court of Appeals affirmed the trial court, and found that the Petitioners had waived any objection to the jury instructions which, in any event, properly stated the law of Ohio on the issue of informed consent. On the issues of denial of directed verdict and denial of judgment notwithstanding the verdict, the Court of Appeals found that the trial court properly submitted

the case to the jury and that there was sufficient evidence to support the jury's verdict.

Petitioners then attempted to obtain review by the Ohio Supreme Court, raising the same state law issues and making no federal claims. The Ohio Supreme Court declined to accept jurisdiction. In a last-ditch effort, petitioners then filed their Petition for Writ of Certiorari in this Court. The Petition raised, for the first time, the argument that Ohio's Informed Consent law violates the Ninth and Fourteenth Amendments of the United States Constitution.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petition should be denied because Petitioners failed to raise the federal questions and constitutional issues at trial or on appeal in Ohio courts, and because Ohio's law on informed consent does not violate Petitioner's constitutional rights.

A.

PETITIONERS FAIL TO RAISE ANY FEDERAL QUESTIONS OR CONSTITUTIONAL CLAIMS IN ANY OF THE OHIO COURTS ADJUDICATING OR REVIEWING THE CASE AND THEREFORE THIS COURT HAS NO JURISDICTION TO REVIEW ANY SUCH FEDERAL QUESTIONS OR CONSTITUTIONAL CLAIMS.

It is a well-established rule that litigants who seek United States Supreme Court review of state court cases must present federal questions and/or constitutional is-

sues first in the state court system, not only as a matter of comity, but also in order to afford the parties an opportunity to develop a record necessary to adjudicate the federal issues. *Webb vs. Webb,* 451 U.S. 493, 68 L.Ed2d 396, 101 S.Ct. 1889 (1981). Moreover, the Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented for decision to the state court, but that the federal question was actually decided. *Southwestern Bell Telephone Company vs. State of Oklahoma,* 303 U.S. 206, 82 L.Ed 751, 58 S.Ct. 528 (1938).

This fundamental jurisdictional rule is emphasized and reinforced in Part V of the Rules of the Supreme Court of the United States, governing jurisdiction on Writ of Certiorari. For example, Rule 21(h) requires a Petitioner seeking review of a state court decision to specify, in the Statement of the Case, the stage in the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; pertinent quotation of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears as will show that the federal question was timely and properly raised so as to give the Supreme Court jurisdiction to review the judgment on Writ of Certiorari.

Petitioners have not, and cannot, comply with Rule 21(h).

Petitioners did not raise a federal question or constitutional challenge, or even refer to the constitutional pro-

visions on which they base their petition, at any stage of the proceedings in either the trial court or the appellate court. Neither of those courts considered any federal question or constitutional challenge and no record has been developed for consideration of those questions or issues in this Court.

Petitioners attempt to circumvent their failure to raise the federal questions below by arguing that their Brief in Support of their proposed jury instructions requesting a subjective instruction on the issue of consent adequately sets forth the federal questions and constitutional challenges they raise for the first time in their Petition to this Court. However, even a casual reading of that Brief, reproduced in Petitioner's Appendix to their Petition at page A18, clearly shows that Petitioners were not raising federal questions or arguing that their constitutional rights had been violated. Rather, Petitioners' argument was that application of an objective standard on the issue of consent would be an incorrect application of *Ohio* law. Petitioners reached that conclusion in their Brief by way of the novel argument that the Ohio Supreme Court, in *Nickell vs. Gonzalez,* 17 Ohio St.3d 136 (1985), "Inadvertently inserted the words 'reasonable person . . . would have decided against the therapy . . .' raising the Ohio standard as previously adopted by Ohio courts from that of patient-subjective to that of unreasonably objective." The Petitioners were clearly making a state law argument in that Brief. Moreover, the Ohio Court of Appeals, as can be seen from its Opinion reproduced in Petitioners' Appendix, attached to their Petition at page A3, decided only questions of Ohio law. That Opinion also restates Petition-

ers' Assignments of Error at the Appellate level, which clearly indicate that no federal questions or constitutional challenges were raised at the Appellate level.

Petitioners did not preserve the federal questions and constitutional challenges which they now seek this Court to review in the state trial or appellate courts and the Petition should be denied.

B.

PETITIONERS' CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY OHIO COURTS' APPLICATION OF AN OBJECTIVE STANDARD IN DETERMINING CAUSATION IN AN INFORMED CONSENT CASE.

Even if Petitioners did preserve the federal questions and constitutional challenges which they now wish this Court to review, they have failed to raise a legitimate constitutional issue before this Court. The elements which must be established in order to state a cause of action for lack of informed consent under Ohio law are set forth in *Nickell vs. Gonzalez, supra.* Those elements are:

(a) The physician failed to disclose to the patient and discuss the material risks inherently and potentially involved with respect to the proposed therapy, if any;

(b) The unrevealed risks and dangers which should have been disclosed by the physician actually materialized and were the proximate cause of injury to the patient; and

(c) A reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.

Determination of causation through the use of this objective standard does not limit personal rights, but rather provides a reasonable and practical means of determining causation after a claim is made. Many jurisdictions throughout the United States have rejected the subjective standard in informed consent cases and have expressly adopted the objective standard. *See,* e.g., *Canterbury vs. Spence,* 464 F.2d 772 (D.C.Cir. 1972). The absolute subjective standard Petitioners advocate is completely unrealistic. A determination under such a standard would ultimately hinge on the credibility of the hindsight of a person seeking recovery after he has experienced unsuccessful or undesirable treatment results. *See, Sard vs. Hardy,* 379 A.2d 1014 (MD Abp. 1977); *Dessi vs. United States,* 49 F. Supp. 722 (D.Va. 1980); and *Cobbs vs. Grant,* 502 P.2d 1 (S.Ct. Calif. 1972). As those courts have held, justice cannot be served by placing the physician at the mercy of every patient's perfect hindsight vision. To do so would be to require a physician to disclose all potential risks, however immaterial they may be. Even then, a physician could still not be adequately assured that he has taken all possible steps to procure informed consent, since he would still be at the mercy of the unpredictable whims and fears of the idiosyncratic patient. The only realistic solution to this problem is a reasonableness standard.

The objective standard of informed consent utilized by the majority of states, including Ohio, does not deprive an individual of due process or privacy, or establish a favored class of defendants in violation of the equal protection clause. The Petition should be denied.

———o———

CONCLUSION

Petitioners failed to raise the federal questions and constitutional issues which they now ask this Court to review at either the trial court level or the Appellate court level in Ohio. This Court, therefore, has no jurisdiction to review those decisions and Petitioners have waived any such claims. Moreover, Petitioners' claims are completely without substantive merit. This Court's review of those decisions is not warranted.

Respectfully submitted,

GARY H. GOLDWASSER,
Counsel of Record
THOMAS R. KELLY
REMINGER & REMINGER CO., L.P.A.
113 St. Clair Avenue, N.E.
Cleveland, Ohio 44114-1273
(216) 687-1311

Counsel for Respondents
Charlotte V. Delhaes, M.D. and
The Lake County Mental
Health Center